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No. 10-629

In the Supreme Court of the United States

YOUN MUN HEE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly sustained the Board of Immigration Appeals' denial of petitioner's motion to reopen the *in absentia* order of removal entered against him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. 10a-11a) and the immigration judge (Pet. App. 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2010. A petition for rehearing was denied on August 11, 2010 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on November 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an immigration judge

"shall conduct proceedings for deciding the inadmissibility or deportability of an alien." 8 U.S.C. 1229a(a)(1). Removal proceedings under 8 U.S C. 1229a commence with the filing of a Notice to Appear (NTA) with the immigration court. 8 C.F.R. 1239.1(a). Additionally, the NTA must be provided to the alien in person or through service by mail on the alien or his representative, if personal service is impracticable. 8 U.S.C. 1229(a)(1). The NTA requires, *inter alia*, that the alien immediately provide to the Attorney General an address where he may be contacted regarding the removal proceedings and that the alien immediately inform the Attorney General of any change in the alien's address. 8 U.S.C. 1229(a)(1)(F). The implementing regulation requires the alien to provide "written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed." 8 C.F.R. 1003.15(d)(2). The NTA also apprises the alien of the consequences of failing to appear for a scheduled hearing—specifically, the possibility that the immigration judge may order the alien removed *in absentia*. 8 U.S.C. 1229(a)(1)(G)(ii).

Notice of a hearing in an alien's case must be provided to him at the last address provided to the Attorney General. 8 U.S.C. 1229(a)(2), 1229a(b)(5)(A). If the alien fails to appear for a scheduled hearing, and the Department of Homeland Security (DHS) establishes by "clear, unequivocal, and convincing evidence" that written notice of the hearing was provided consistent with the terms of the statute, the alien "shall be ordered removed in absentia." 8 U.S.C. 1229a(b)(5)(A). An *in absentia* order of removal may be rescinded in only two circumstances: (1) if the alien demonstrates that his failure to appear was on account of exceptional circum-

stances, by a motion to reopen filed within 180 days of entry of the *in absentia* order; or (2) if the alien demonstrates that he failed to receive notice consistent with 8 U.S.C. 1229(a), by a motion to reopen filed at any time. 8 U.S.C. 1229a(b)(5)(C)(i) and (ii).

2. a. Petitioner is a native and citizen of South Korea. Pet. App. 10a. On or about June 30, 2006, DHS personally served petitioner with an NTA charging him with being subject to removal pursuant to 8 U.S.C. 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. Pet. App. 15a. The NTA listed a Nashville, Tennessee address that petitioner had provided during an earlier immigration interview as the location to which notices in his proceedings would be mailed. *Id.* at 2a. The NTA also warned petitioner that (1) he was "required to provide the [Immigration and Naturalization Service (INS)], in writing, with [his] full mailing address and telephone number"; (2) he must "notify the Immigration Court immediately by using Form EOIR-33" of any changes in address or phone number; (3) if he failed to submit Form EOIR-33 and did not "otherwise provide an address," the government was not required to provide him with written notice of his hearing; and (4) if petitioner failed to appear at his hearing, the immigration judge might enter a removal order in his absence. *Id.* at 2a-3a (brackets in opinion).

On July 15, 2008, petitioner's wife submitted to DHS a Form I-130 "Petition for Alien Relative" so that petitioner could apply for an adjustment of status. Pet. App. 3a. That form listed petitioner's address as one in Tucker, Georgia, and represented that petitioner had been living at that Georgia address since October 2007. *Ibid.* The form also (incorrectly) stated that petitioner

had been in removal proceedings since May 2008. *Ibid.* No notice of the Georgia address was provided to the immigration court or to any other component of the Department of Justice. See *id.* at 7a n.3; Gov't C.A. Br. 14-18.

On July 23, 2008, the immigration court mailed to petitioner a notice of hearing in his removal proceedings at the Nashville, Tennessee address he had previously provided. Pet. App. 3a, 15a. The hearing notice was returned to the immigration court as undeliverable, with an indication that it could not be forwarded. *Id.* at 3a. Petitioner failed to appear at the scheduled hearing, and the immigration judge ordered him removed *in absentia* at the conclusion of that September 17, 2008 hearing. *Ibid.*

b. In December 2008, petitioner filed a motion to reopen his removal proceedings and to rescind the *in absentia* order of removal. Pet. App. 4a. Petitioner argued that he did not receive the notice of hearing, as he had moved from the Nashville, Tennessee address. *Ibid.* Petitioner contended that the notice was invalid and should have been sent to his current address in Georgia, because that address had been listed in the I-130 visa petition his wife submitted to DHS. *Ibid.*

The immigration judge denied petitioner's motion. Pet. App. 12a-16a. The immigration judge found that petitioner "failed to notify the [immigration] [c]ourt of his change-of-address" and that the hearing notice was thus properly mailed to his last known address. *Id.* at 16a. The immigration judge added that, "in light of [petitioner's] admission when apprehended that he came into the United States by walking across the U.S.-Canada border and that he was not inspected or admitted, he is

ineligible to adjust his status in the United States." *Ibid.*

c. The Board of Immigration Appeals (Board) dismissed petitioner's appeal of the immigration judge's decision. Pet. App. 8a-11a. The Board noted that petitioner had been personally served with the NTA and that it had informed him of both the change-of-address notification requirements as well as the consequences of failing to appear for a scheduled hearing. *Id.* at 11a. The Board determined that petitioner had failed to notify the immigration court of his change in address by filing a Form EOIR-33, and, in doing so, rejected his contention that his wife's submission of an I-130 visa petition to DHS was sufficient to put the immigration court on notice of his address change. *Ibid.* Because the hearing notice was mailed to the last address provided by petitioner to the immigration court, the Board agreed with the immigration judge that notice was adequate. *Ibid.*

3. The court of appeals denied petitioner's petition for review in an unpublished, per curiam opinion. Pet. App. 1a-7a. The court concluded that the hearing notice had been properly mailed to the Nashville, Tennessee address, because that address was the last one petitioner had provided. *Id.* at 7a. Holding that such notice was sufficient under the relevant statutes, the court found no abuse of discretion in the Board's denial of petitioner's motion to reopen. *Ibid.*

In reaching that conclusion, the court did not address the specific arguments raised by petitioner and the government in their respective briefs. See Pet. App. 7a n.3. The court did not reach petitioner's contention that the Board erred in presumptively requiring a notice of a change of address to be on a specific form (Form EOIR-

33), or the government's argument that the filing of the I-130 visa petition was insufficient notice to the Attorney General because DHS is not a component of the Department of Justice or a delegate of the Attorney General under the INA. *Ibid.* Rather, the court decided only that the I-130 visa petition submitted by petitioner's wife was insufficient. *Id.* at 6a-7a. The court observed that the petition did not explicitly state that the Georgia address was a new address or that it was a change of address since the time petitioner was placed into removal proceedings. *Ibid.* To the contrary, the court explained, the petition (incorrectly) indicated that petitioner's removal proceedings had begun in May 2008 but that he had been living at the Georgia address since October 2007. *Id.* at 7a. The court thus held that, "even assuming *arguendo* a Form I-130 could be used to make the required change-of-address notification," the contents of the Form I-130 submitted in this case were inadequate under 8 U.S.C. 1229(a)(1)(F)(ii) to effect an official change of address. Pet. App. 7a.

ARGUMENT

Petitioner contends that the decision below conflicts with this Court's holding in *SEC* v. *Chenery*, 318 U.S. 80 (1943), that a court of appeals may not dispose of a petition for review of an administrative agency decision on a ground not relied upon by the agency. The decision below, however, is correct and does not clearly implicate *Chenery*, as the Board and the court of appeals reached the same conclusion for the same ultimate reason—*i.e.*, that petitioner had not validly changed his address of record. Although the court of appeals relied in part on a narrower basis than that considered by the Board, *Chenery* does not forbid that result. In any event, there

were (and are) no compelling reasons for a remand: petitioner does not and cannot make any colorable claim that a different result would have been reached on remand, nor any colorable claim that he could pursue relief from removal even if proceedings were reopened. Further review is therefore unwarranted.

1. The decision below does not implicate this Court's decision in *Chenery*. Under *Chenery*, courts of appeals generally are not empowered to decide a petition for review of administrative action on a ground not relied upon by the agency. See 318 U.S. at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Rather, if a reviewing court finds error in the agency's rationale for its decision, or the ultimate decision itself, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985).

In this case, the court of appeals upheld the Board's denial of petitioner's motion to reopen and to rescind the *in absentia* removal order. In doing so, the court based its determination on the same determination the Board made: that the hearing notice at issue was adequate because it was mailed to the last address provided by petitioner to the immigration court. See Pet. App. 7a, 11a. At that level, the decision of the court of appeals is fully consistent with the Board's decision and presents no *Chenery*-related problem.

It is true that the Board based its determination in part on the fact that petitioner did not inform the immigration court directly of his change of address by filing a Form EOIR-33. Pet. App. 11a. But the court of appeals did not find any error in the Board's determination

that the regulatory scheme required petitioner to inform the immigration court of any address change, or that notice to DHS (as opposed to the Department of Justice) was insufficient under the statute to effect notice of a change of address. *Id.* at 7a & n.3. Rather, the court of appeals stated that, "even assuming *arguendo* a Form I-130 could be used to make the required change-of-address notification," the petition for review must still be denied on the narrower ground that the Form I-130 submitted by petitioner's wife did not do so within the meaning of 8 U.S.C. 1229(a)(1)(F)(ii). Pet. App. 7a. *Chenery* does not require parsing an agency's rationale so finely as to prohibit the court of appeals' rejection of petitioner's position in the manner done below.

2. A practical application of *Chenery* further demonstrates no basis for a remand to the agency. As an initial matter, as noted above, the court of appeals did not find any error in the Board's analysis of petitioner's claim. See Pet. App. 6a-7a. Moreover, petitioner makes no colorable claim that the Board would have reached a different result if a remand had been ordered. Indeed, both the Board and the court of appeals were plainly correct.

As to the former, the relevant statute requires notice to the Attorney General regarding any change in the alien's address, and the relevant regulation makes the immigration court the Attorney General's delegate (and, by its terms, requires submission of Form EOIR-33). See 8 U.S.C. 1229(a)(1)(F)(ii); 8 C.F.R. 1003.15(d)(2); p. 2, *supra*. Notice *to DHS*, a different Cabinet Department over which the Attorney General exercises no authority, by means of a different form filed by petitioner's wife and serving a different purpose is clearly outside the statutory and regulatory scheme.

Even assuming *arguendo* that the statute authorized submission of an I-130 visa petition to DHS to effect notice of a change of address, as the court of appeals did, the I-130 petition submitted by petitioner's wife was insufficient for the reasons stated in the court's decision. There was no indication on the face of that document that the address contained therein reflected a change in petitioner's address. Pet. App. 6a-7a. The document indicated that petitioner had been living at the Georgia address since October 2007 and that removal proceedings had been initiated in May 2008 (even though they had actually begun in June 2006). *Ibid.* That timeline gave DHS (let alone the Department of Justice) no reason to believe that the Georgia address was a new address because, according to the I-130 petition, petitioner had been living at the Georgia address *before* the institution of removal proceedings. In light of that erroneous submission even to DHS, for which the government bears no fault, there is no reasonable likelihood that the Board would have reached a different decision on remand regarding the ultimate outcome of petitioner's motion to reopen. "To remand [in this case] would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion).

3. In any event, further review is not warranted in this case to consider petitioner's claim of a factbound misapplication of *Chenery*. The unpublished, per curiam opinion below does not implicate a principle of law on which the courts of appeals are in disagreement, and petitioner does not contend otherwise. And for the reasons explained above (pp. 8-9, *supra*), there is no basis for concluding that granting the petition and remanding

to the court of appeals would have any effect on the ultimate disposition of petitioner's motion to reopen.

Finally, even assuming that removal proceedings were reopened, it does not appear that petitioner would be eligible to adjust his status from within the United States anyway, as he entered without being admitted or inspected and has not alleged eligibility for adjustment of status under 8 U.S.C. 1255(i) (providing that certain aliens unlawfully present in the United States may adjust their status). See Pet. App. 16a ("[I]n light of [petitioner's] admission when apprehended that he came into the United States by walking across the U.S.-Canada border and that he was not inspected or admitted, he is ineligible to adjust his status in the United States."); see also 8 U.S.C. 1255(a) (providing that the Attorney General may adjust status of "an alien who was inspected and admitted or paroled into the United States * * * to that of an alien lawfully admitted for permanent residence"); 8 C.F.R. 1245.1(b)(3) (alien not inspected or admitted is generally ineligible to apply for adjustment of status under 8 U.S.C. 1255). The lack of any likely effect on petitioner's status as a removable alien is a further reason to decline review.*

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* Petitioner has not asserted eligibility for any other form of relief from removal, nor is it apparent that he would be eligible for such any relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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